Before the
Federal Communications Commission
Washington, D.C. 20554

IN THE MATTER OF ***BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*** ***Notice of Inquiry***	))))))))	**WC Docket No. 03-251**

INITIAL COMMENTS OF THE
PUBLIC SERVICE COMMISSION OF MARYLAND

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The Public Service Commission of Maryland ("MDPSC") respectfully submits these initial comments in response to the March 25, 2005, released *Memorandum Opinion and Order and Notice of Inquiry ("Order and NOI")*, FCC 05-78, 70 Federal Register 19466 (April 13, 2005). The *"NOI"* portion of the *Order and NOI* solicits comments on the competitive impact of the tying and bundling by incumbent local exchange carriers ("ILECs") of traditional services and new services.

I. Summary of Comments

In these comments, the MDPSC discusses the implications of the Federal Communication Commission's ("FCC") findings in FCC 05-78. FCC 05-78 has impaired the MDPSC's state law obligation to prevent consumer discrimination in the local wire-line market at the state level.[1]

[1] Md. Code PUC §4-503(b).

The MDPSC urges the FCC to consider another course that promotes local competition and advanced telecommunications services. The MDPSC's comments will focus upon its experience with the tying by Verizon Maryland Inc. ("Verizon-MD") of its digital subscriber line ("DSL") service and its local telephone service in the MDPSC's Case No. 8927, *In the Matter of the Complaint of CloseCall America, Inc., v. Verizon Maryland Inc.*

II. MDPSC CASE NO. 8927

The MDPSC's Case No. 8927 was initiated via the filing of a complaint by CloseCall America, Inc. ("CloseCall") against Verizon-MD. CloseCall alleged that Verizon-MD links the availability of voicemail and digital subscriber line ("DSL") services to the purchase of Verizon-MD local telephone service, and that customers who choose an alternative local telephone service provider lose their ability to purchase voicemail and DSL service from Verizon-MD.[2] CloseCall argued that this hampers the development of competitive local telephone service and harms customers. Verizon-MD denied any anti-competitive impact and asserted that the MDPSC does not have the authority to compel Verizon-MD to sell its voicemail on a wholesale basis, or to compel Verizon-MD to provide its DSL services to a customer who chooses an alternative voice provider.[3] After a full evidentiary proceeding, the MDPSC issued Order No. 79638, which *inter alia*, determined that Verizon-MD was prohibited from tying DSL services to Verizon local telephone service. Verizon-MD filed a Complaint in the United States District Court for the District of Maryland on December 30, 2005, challenging the MDPSC Order. The

[2] Throughout these Comments, it should be understood that Verizon-MD's DSL service is actually provided by Verizon Internet Services, Inc. ("VIS"), a Verizon-MD affiliate that functions as an Internet service provider using loops provided by Verizon-MD.

[3] Verizon-MD actually wears three separate hats: it provides retail voice service in competition with CloseCall, it leases network facilities including local switching and loops to CloseCall, and it functions as a gatekeeper between VIS and the end-use customer. From the end-use customer's perspective, Verizon-MD appears to be the provider of Internet service.

court case is currently stayed pending the MDPSC's decision on a Motion to Amend filed in Case No. 8927 before the MDPSC by Verizon-MD regarding Order No. 79638, as a result of the FCC's decision in FCC 05-78.

In its Order No. 79638 in its Case No. 8927, the MDPSC held that it did not have jurisdiction to directly regulate voicemail and DSL services. These services are "information services" for which the FCC has preempted state regulation.

Even though both voicemail and DSL services are information services rather than telecommunications services, the MDPSC concluded that it retained the ability to act in order to mitigate discriminatory and anti-competitive impacts upon state-regulated services, like local telephone service, over which the MDPSC does have jurisdiction. In fact, the MDPSC found that it has affirmative obligations to enforce the nondiscrimination provisions of its statute and to encourage competition in Maryland's telecommunications market.

Both Verizon-MD and CloseCall are telephone companies within the definition provided in Annotated Code of Maryland, Public Utility Companies ("PUC") Article § 1-101(kk),[4] and thus are public service companies within PUC § 1-101(w).[5] As public service companies, both are subject to the MDPSC's jurisdiction under PUC § 2-112(a), the MDPSC's general jurisdictional grant. PUC § 2-112(b) provides that the MDPSC has both the "powers specifically conferred by law" as well as "the implied and incidental powers needed or proper to carry out its functions under [the Public Utility Companies] article." PUC § 2-113 requires the MDPSC to

[4] A "telephone company" is defined as "a public service company that: (i) owns telephone lines to receive, transmit, or communicate telephone or teletype communications; or (ii) leases, licenses, or sells telephone or teletype communications." PUC § 1-101(kk).

[5] A "public service company" is "a common carrier company, electric company, gas company, sewage disposal company, telegraph company, *telephone company*, water company, or any combination of public service companies." PUC § 1-101(w) [emphasis added].

"supervise and regulate the public service companies subject to the jurisdiction of the …[MDPSC] to… ensure their operation in the interest of the public… and… promote adequate, economical, and efficient delivery of utility services in the State *without unjust discrimination….*" [Emphasis added.] The MDPSC is charged with enforcing the prohibitions against discrimination that are contained in PUC § 4-503, which provides:

> (b) *Prohibited.* – For any service rendered or commodity furnished, **a public service company may not directly or indirectly**, by any means, including special rates, rebates, drawbacks, or refunds:
>
> (1) charge, demand, or receive from a person compensation that is greater or less than from any other person under substantially similar circumstances;
>
> (2) extend a privilege or facility to a person, except those privileges and facilities that are extended uniformly to all persons under substantially similar circumstances;
>
> (3) **discriminate against a person, locality, or particular class of service**; or
>
> (4) **give undue or unreasonable preference to or cause undue or unreasonable prejudice to a person, locality, or particular class of service**. [Emphasis added.]

Additionally, the MDPSC has obligations under Maryland law (*see, e.g.,* PUC § 4-301(b)(2) and PUC § 8-501), and the Federal Telecommunications Act of 1996, to promote competition in the telecommunications industry.

In Order No. 79638, the MDPSC found that Verizon-MD's voicemail tying practices have a *de minimus* impact upon local telephone competition. Since Verizon-MD's voice mail service practices do not adversely affect competition in the local telephone service market, the MDPSC found no need or justification for MDPSC action. The analysis of the impact upon local telephone competition of Verizon-MD's DSL practices was different, however. The MDPSC found that, in Maryland, Verizon-MD's policy of denying its VIS DSL service to a customer who switches to an alternate voice service provider has an adverse impact upon the competitive local telephone service market. The MDPSC also found that it is a discriminatory practice, and thus contrary to PUC §§ 4-503(b)(3) and (4) [quoted above], for Verizon-MD to deny its VIS DSL service to a customer that switches from Verizon-MD's voice service to an alternate voice service provider. Further, the MDPSC found that it is a violation of PUC § 4-503 for Verizon-MD to offer its VIS DSL service to customers who choose its voice service and to deny its VIS DSL service to customers who choose a competing voice service. The MDPSC found that this practice has a chilling effect upon the exercise of a customer's right to choose among competing voice service providers and is at odds with the pro-competitive policy of the Telecommunications Act of 1996. Consequently, the MDPSC required Verizon-MD to continue to facilitate the provision of VIS DSL service to all customers, regardless of whether the voice service provider is Verizon-MD or a CLEC. The MDPSC limited this obligation to those CLECs that also allow Verizon-MD to use the high frequency portion of the loop for the provision of DSL service *at no charge* to either Verizon-MD or VIS. To the extent that a CLEC would prefer to charge Verizon-MD for access to its leased facilities for the provision of VIS DSL, the MDPSC viewed the matter of continued availability of Verizon-MD's VIS DSL service best left to bilateral negotiations between Verizon-MD and the CLEC.

The MDPSC continues to hold the opinion, based upon the record in Case No. 8927, that Verizon-MD's policy is discriminatory and hampers local wireline competition. The MDPSC believed that it had jurisdiction over tying practices of Verizon-MD by virtue of its jurisdictional responsibility over local telephone service, although it did not and could not regulate DSL directly. Having determined that the tying practice did not comport with Maryland law, and that the practice adversely affected local telephone service competition, the MDPSC ordered Verizon-MD not to engage in the practice.

III. THE EFFECT OF FCC 05-78

FCC 05-78 preempts state jurisdiction with respect to DSL service provided over UNE lines. In the FCC's words: "[s]tate decisions that require BellSouth to provide its DSL service over a competitive LEC's leased UNE loop facility impose a condition on the UNE facility that effectively unbundles the… [low frequency portion of the loop], and is therefore inconsistent with federal law." FCC 05-78, ¶ 27. Specifically, "state rulings… [requiring continuation of incumbent local exchange carrier ("ILEC") DSL service] are inconsistent with and substantially prevent the implementation of federal unbundling rules and policies developed by the [FCC]… in the *Triennial Review Order*, and those rulings therefore exceed the Act's reservation of state authority [in section 251(d)(3)] with regard to unbundling determinations." FCC 05-78, ¶ 17.

In our view, the MDPSC's order did not create an obligation for Verizon-MD to unbundle the low and high frequency portions of the loop and sell either portion separately. Instead, it required Verizon-MD to continue to offer its VIS DSL service (high speed transport plus internet service) to the end-user in those instances where the CLEC purchases the loop in order to provide local voice service and agrees to allow Verizon-MD to use the high frequency portion of the loop without charge. The CLEC still purchases the entire loop from Verizon-MD. Verizon-MD still sells the entire loop to the CLEC. The only change is that the CLEC permits Verizon-MD to use the high frequency portion of the loop – free of charge - for DSL transport. In exchange, Verizon-MD continues to provide its VIS DSL service to CLEC voice service customers who want to pay Verizon-MD for the privilege of receiving Verizon-MD's DSL service package. The relationship ends, and full use of the high frequency portion of the loop reverts to the CLEC, as soon as the CLEC decides to start charging Verizon-MD for its use.

On its face, this arrangement clearly benefits Verizon-MD. Verizon-MD pays nothing for the transport and gets paid by the customer for the DSL service and by the CLEC for the loop itself. This arrangement is also one that an independent Internet service provider would and should find attractive, since the Internet service is provided to the end user over a loop that the provider receives at no cost. However, in Maryland, absent the action taken by the MDPSC in Order No. 79638, Verizon-MD's interest in retaining its voice service customers results in the termination of the provision of VIS's DSL service for any end user deciding to take voice service from a CLEC.

In the MDPSC's view, the FCC's decision is narrowly constructed and leaves a number of issues undecided; of these, the deferral of the "tying" issue is critical. By ruling as it did, the FCC did not reach any decision at all in FCC 05-78 on the anti-competitive impact of ILEC DSL disconnection policies. Instead, the FCC established this new proceeding, this *NOI*, deferring consideration of the "tying" question. In the interim, one avenue for local voice service competition in states like Maryland is significantly encumbered. Specifically, CLECs face the potential loss of existing local voice service customers and a reduced ability to recruit new local voice service customers because of ILEC tying policies. The FCC can fill this void by putting regulations in place that eliminate arrangements that tie or bundle traditional voice service with other communications products and services in a discriminatory or anti-competitive manner.

The stated scope of the FCC's *NOI* is also of interest to the MDPSC. The MDPSC observes that the *NOI* states that the FCC's intention is to "address broader questions regarding the tying or bundling of services." FCC 05-78, ¶ 37. Indeed, the FCC asks about benefits to consumers from bundling. However, it does not appear to specifically ask about harm to consumers from tying arrangements. The *NOI* suggests that bundling harms competition by forcing consumers to purchase unwanted or redundant services; it does not ask about harm to competition when customers cannot purchase the alternative local voice service that they want without giving up the ILEC DSL service that they also want. The *NOI* asks "whether competition is supplying sufficient incentives for providers to disaggregate bundles to maximize consumer choice" (Id.); it does not ask, as it should, whether the threat of local voice service competition has supplied an incentive for ILECs to bundle services in a way that actually inhibits competition. The *NOI* seeks comment on whether bundling is harmful to competition, but focuses on "unaffiliated providers of new services, such as voice over Internet protocol (VoIP)" (Id.), not on the arrangements and impediments at issue in WC Docket 03-251. Particularly, the MDPSC would appreciate FCC examination in WC Docket 03-251 of the issue of whether competition in the traditional local voice services market is harmed by ILEC bundling of new ILEC services with traditional ILEC services.

It is worth noting that FCC 05-78 does not address situations where the CLEC providing the local voice service is doing so over a resale line rather than via a UNE loop. In this situation, Verizon-MD also discontinues its DSL service when a customer switches to the CLEC. Thus, in response to FCC 05-78, the MDPSC could legitimately limit any amendment of its Order No. 79638 to UNE-based service only, since ordering the provision of DSL over a resale line does not "create a new UNE." However, leaving the requirements in place with respect to resale-based service would result in a patchwork of availability for Verizon-MD's existing and potential DSL customers that would be confusing to the general public in Maryland. The MDPSC respectfully requests that the FCC's inquiry give full consideration to these issues.

IV. CONCLUSION

The MDPSC appreciates the opportunity to provide input to the Commission in this matter. The MDPSC requests that the FCC devote attention in its inquiry on the impact of ILEC tying policies, especially DSL service tying policies, upon the local telephone service market.

Respectfully submitted,

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